IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 335

DEPARTMENT OF REVENUE, - - Petitioner,

vs.

JAMES B. BEAM DISTILLING COMPANY, Respondent.

BRIEF FOR RESPONDENT.

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v.

JAMES B. BEAM DISTILLING COMPANY, - *Respondent.*

BRIEF FOR RESPONDENT.

QUESTION PRESENTED.

Respondent is not satisfied with Petitioner's statement of the question presented.

The sole question presented is whether, on the facts of this case, the following section of the Kentucky Revised Statutes contravenes the import-export clause (Article I, Sec. 10 Cl. 2) of the U. S. Constitution:

K.R.S. 243.680 (2):

> "(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.
>
> "(b) No railroad company or express company shall receive for shipment or ship into this

state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

It is Respondent's contention, sustained by the Kentucky Court of Appeals (R., pp. 36-40), that the foregoing section of the Kentucky Revised Statutes contravenes Article I, Sec. 10 Cl. 2 of the U. S. Constitution as applied to imported liquors in the possession of the importer and still in original packages, prior to sale or use by the importer.

STATEMENT.

We find two objections to the statement of the case in Petitioner's brief (pp. 6-7). They are these:

1. While the statement is adequate as far as it goes, it fails to make clear that "the tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer" (see Court of Appeals' Opinion, R. p. 37).

2. Petitioner's Statement is in error in asserting that "Payment of the tax at the time was discretionary as Respondent could have deferred payment without penalty had it so elected."

All importers under the Kentucky Statute and Regulations must obtain import permits prior to bring-

ing distilled spirits into Kentucky and must pay the tax at the rate of ten cents per proof gallon before the permit will be issued by the Department of Revenue.

For the foregoing reasons, we ask the Court to accept as our statement of the case, the facts set forth in the Opinion of the Kentucky Court of Appeals (R., pp. 36-37).

This statement of the case by the Court of Appeals has never been questioned by Petitioner. It is concise, contains all of the essential facts, and is free from extraneous matters.

ARGUMENT.

PART I.

Meaning of "Import".

In order to receive the constitutional immunity from state taxation, imported articles must withstand the following tests at the time they are sought to be taxed.

1. The article must have been "brought into the country from a place without it", *i. e.*, from some place which has not "been united governmentally with the United States by and under the Constitution". Hoover & Allison Co. v. Evatt (1944), 324 U. S. 652, 89 L. Ed. 1252, 1267, 1268. Hence goods transported from one state to another are not imports since they are articles originating in the United States and not brought into it. (*Idem*, p. 1265).

2. The article must still be in the original package in which it was brought into this country. Brown v. Maryland (1827), 12 Wheat U. S. 419, 6 L. Ed. 678.

3. The article must still be in the hands of the original importer, Brown v. Maryland (*supra*), prior to any re-sale (*Idem*); and if brought in by the importer for his own use, prior to any such use by him. Youngstown Sheet & Tube Co. v. Bowers (1959), 358 U. S. 354, 3 L. Ed. 2d 490.

The Scotch whiskey imported by Respondent (hereinafter referred to as the Taxpayer) in the case at bar meets all of the foregoing tests as shown by the record before the Department of Revenue and the Kentucky Tax Commission (R., pp. 5-21). The facts as set forth in Taxpayer's application for refund and the affidavit supplied by its Custom House Broker are undisputed (R., pp. 5-7).

It is not disputed that the tax was collected while the imports remained in unbroken packages in the hands of the original importer and prior to re-sale or use by him.

The case of Brown v. Maryland (*supra*) decided by this Court in 1827 (opinion by Chief Justice Marshall), was the first case to test the constitutionality of a state law imposing a tax on imports. In view of the fact that it established basic principles which have been adhered to ever since in an unbroken line of decisions, the case calls for close scrutiny and analysis.

In 1825 Maryland had enacted a law which laid a tax of $50.00 on all "importers", the language of the act being as follows:

"And be it enacted that all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or by package, or of wine, rum brandy, whiskey and other distilled spirituous liquors etc. and other persons selling the same by wholesale, bale, or package, hogshead barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

The question at issue was posed by Chief Justice Marshall as follows:

"The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign goods to take out a license from the state before he shall be permitted to sell a bale or package so imported."

The Chief Justice then directed himself to the words of Article I Sec. 10 Cl. 2 of the Constitution, which prohibits a state from laying "any imposts or duties on imports or exports", and made this inquiry:

"What then is the meaning of the words 'imposts or duties on imports or exports'?"

He answered his own question thus:

"An impost or duty on imports is a custom or tax levied on articles brought into a country and

is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in his custody. It would not however, be less an impost or duty on the articles, if it were to be levied on them after they had landed."

Recognizing that an "import" must necessarily cease to be such at some time and become thereafter subject to state taxation, the Chief Justice went on to observe:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution."

Ever since the first Revenue Act in 1789, the United States had been collecting customs duties on imports as one of its principal sources of revenue.

In evident note of this fact Justice Marshall said:

> "By payment of import duties to the United States, the importer purchases the right to dispose of his merchandise as well as to bring it into the country."

It was argued by the Attorney General of Maryland that the Maryland tax was not a tax on the imported article itself but a tax only on the occupation of importer. This is the same argument now being made by Counsel for Petitioner.

This contention was answered as follows:

> "It is argued that this is not a tax on the article, but on the person. The state, it is said, may tax occupations and this is nothing more.
>
> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. * * * So, a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer, or by the importer himself in like manner as a direct duty on the article itself. This a state has not the right to do because it is prohibited by the Constitution."

ARGUMENT (Continued)

PART II.

A State May Not Lay *Any* Tax on "Imports" as That Term Is Interpreted by the U. S. Supreme Court.

In the first case to arise involving a state tax on imports (Brown v. Maryland), the tax was an occupational tax levied on an importer.

Since then this Court has struck down various other forms of state taxation whenever it has found the tax to be one levied on an "import" as originally interpreted by Chief Justice Marshall.

For example, in the case of Hooven & Allison v. Evatt, 324 U. S. 652, 89 L. Ed. 1252 (1944), the tax held unconstitutional was an ad valorem property tax levied on bales of hemp and other fibers imported from the Philippine Islands while the articles remained in their original packages and before being sold or put to the use for which they had been imported.

In Richfield Oil Corp. v. State Board of Equalization (1946), 329 U. S. 69, 91 L. Ed. 80, the invalidated tax was one which the Supreme Court of California had construed to be "an excise for the privilege of conducting a retail business measured by the gross receipts from sales".

By way of pointing out that it is the effect of the tax rather than what the tax is called or what form it takes, this Court speaking through Mr. Justice Douglas said:

> "That construction (the California Supreme Court's) is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax but its operation and effect."*

Low v. Austin, 13 Wall. 29 (1871), involved a California ad valorem tax on some cases of imported wines still in unbroken packages and in the hands of the original importer.

By the Court (Mr. Justice Field):

> "The simple question presented in this case for consideration is whether imported merchandise

*Annotations on this general question will be found in 89 L. Ed. 1279 and 95 L. Ed. 496.

upon which the duties and charges of the custom house have been paid, is subject to state taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer.

"The decision of this Court in the case of Brown v. Maryland furnishes the answer to the question. * * *

"The question is not as to the extent of the tax or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. * * * Imports whilst retaining their distinctive character as such must be treated as being without the jurisdiction of the taxing power of the state."

We have demonstrated that whether the state tax be an occupational tax, an excise or an ad valorem tax; and regardless of what it may be called, if, in fact, it is a tax on imports, as that term is interpreted by this Court, the levy is invalid.

ARGUMENT (Continued)

PART III.

The Passage of the Twenty-First Amendment Has Not Changed the Rule That Alcoholic Liquors Imported From Foreign Countries Are Immune From State Taxation so Long as They Retain the Status of "Imports".

In the case at bar we are dealing with alcoholic liquor. This fact raises the question as to whether imported alcoholic liquors, by reason of their nature, are to be treated any differently under the Import-Export Clause from other imported goods.

We have seen that this Court held in the case of Low v. Austin (*supra*) that imported wines were not subject to an ad valorem property tax while remaining in the original cases, unbroken and unsold, in the hands of the importer. This case was decided in 1871.

The case at bar presents a further inquiry which has not heretofore been passed on by this Court, viz.: Did the passage of the Twenty-First Amendment (1933) in any way change the rule laid down in Low v. Austin (*supra*)?

The Twenty-First Amendment reads:

> "§1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "§2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

We confidently maintain that Sec. 2 of this Amendment has not had the effect of repealing pro tanto the Import-Export Clause of Article I of the Constitution and that imports of alcoholic liquors from foreign countries are still immune from state taxation providing they meet the test of "imports" as defined by this Court.*

A recent California case dealt with this question which is also the precise question at issue in the case at bar. Parrot & Co. v. San Francisco (1955), 280 Pac. 2d 881.

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*Annotations dealing with decisions since the passage of the 21st Amendment will be found in 84 L. Ed. 37 and 88 L. Ed. 614.

The City of San Francisco levied and collected an ad valorem property tax on some imported liquor. As stated in the opinion: "Admittedly, the liquor was still in the original unbroken packages in which it had been imported. Admittedly this liquor was held by respondents in identifiable and segregated lots separate from their other merchandise store in the warehouses. Admittedly, on the first Monday of March 1952 (the assessment date), the liquor had not been disposed of by respondents by consignment or sale."

The levy was made after the city had demanded that the respondents list all personal property owned or controlled by them or in their possession on the assessment date. The imported liquor was separately listed and taxed separately from the other personal property of the taxpayers. The respondents paid that portion of the tax assessed against the imported liquor and instituted suit for refund on the ground that the liquor was exempt from state taxation under the Import-Export clause of the U. S. Constitution.

Both the lower Court and the California Supreme Court held the liquor in question to be exempt from state taxation.

The tax in this case was an ad valorem property tax, while the tax in the case at bar is an occupational or license tax. But as we have seen, the nature of the tax or by what name it is called is immaterial if in fact it is a tax on imports. Richfield Oil Corp. v. State Board of Equalization (*supra*).

In all other respects the Parrot case is on "all fours" with the case at bar and so we will quote fully

from the opinion, since its reasoning has been adopted as the law of Kentucky by the Kentucky Court of Appeals (see R., p. 40):

By the Court:

"The problem revolves around the proper interpretation of two sections of the Constitution of the United States.

"Article One, Section 10, of that Constitution contains an enumeration of those powers that are prohibited to the states. Paragraph 2 of the section reads as follows:

> 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.'

"The Twenty-First Amendment to the United States Constitution repealed the Eighteenth Amendment[1] and also provided in section 2: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violations of the laws thereof, is hereby prohibited.'

"The California Constitution, Article XIII, Section one, permits *ad valorem* taxation of 'All

[1]The Twenty-first Amendment became effective December 5, 1933

property in the State * * * not exempt under the laws of the United States'. (See also §§ 201 and 202, Rev. & Tax Code.)

"The question presented is whether intoxicating liquor, imported into the United States from a foreign country, while still in the hands of the importer, and while such liquor is still in its original packages, unconsigned and unsold, is property 'exempt' from taxation 'under the laws of the United States'? It is the theory of appellant that, although such liquors are imports to which the import-export clause would normally be applicable so as to prevent state taxation, such taxation is permitted because the Twenty-first Amendment removed intoxicating liquor from the constitutional protection of the import-export clause. In other words, it is urged that, under that amendment, intoxicating liquor has been made a special article of commerce, removed from the protection of the import-export clause, and that its control, including the power to tax it, has been granted exclusively to the states.

"The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned.

"Before directly dealing with the proper interpretation of the Twenty-first Amendment some mention should be made of the general law interpreting the breadth and scope of the import-export clause. As early as 1827 Chief Justice Marshall,

speaking for the United States Supreme Court in the case of Brown v. State of Maryland, 12 Wheat. 419, 6 L. Ed. 678, enunciated the so-called 'original package' doctrine. Under that doctrine foreign imports, while still in their original packages and in the hands of the original importers, were held immune from state taxation. In 1871, in the case of Low v. Austin, 13 Wall. 29, 20 L. Ed. 517, the United States Supreme Court, in a case similar to those here under consideration, held that the 'original package' doctrine applied to foreign imported liquor so as to render such liquor free from state taxation. The 'original package' doctrine, as far as foreign imports are concerned, has been followed by the United States Supreme Court in a long line of cases. One of the most recent is Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, decided in 1945, and written by Chief Justice Stone. In that case the state attempted to levy an *ad valorem* tax on certain hemp imported by an Ohio manufacturer and held by him in the original packages preparatory for use in his Ohio factory. It was held that the import-export clause barred such taxation. After quoting the import-export clause the court stated, 324 U. S. at page 656, 65 S. Ct. at page 873:

'These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in

Brown v. Maryland, supra. We do not understand anyone to challenge that rule in this case.

'It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framer, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties."[2]

"After discussing and quoting from Brown v. State of Maryland, supra, the court continued, 324 U. S. at page 657, 65 S. Ct. at page 873:

'Although one Justice dissented in Brown v. Maryland, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. [Citing many cases, including Low v. Austin, the liquor case cited *supra*.]'

"The court also discussed the difference between the power of the state to tax goods in the original packages when they are in interstate commerce and when they are foreign imports. In this connection the court stated, 324 U. S. at page 665, 65 S. Ct. at page 877:

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[2]See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

'In the one case [foreign imports] the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other [interstate commerce] the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not.'

"Appellant does not challenge the well-settled rules of law above set forth, and concedes that, were it not for the Twenty-first Amendment, the City would be powerless to tax the liquor here involved. But it is asserted that that amendment removed intoxicating liquor from the protection of the import-export clause.

"In considering this argument there are certain general observations that should be made. The Twenty-first Amendment contains no mention of taxation at all, and certainly does not provide, expressly, for the repeal of any portion of Article 1, Section 10, of the Constitution. If a *pro tanto* repeal took place it occurred by implication based on the theory that in their application to foreign imported liquor the two sections are inconsistent. Not only are repeals by implication not favored in the law, and will not be found to exist unless the two provisions are wholly irreconcilable (see discussion 11 Cal. Jur. 2d p. 351, § 39), but here, if the two provisions are laid side by side it will be discovered that no word or phrase of one is inconsistent with the other. The two sections, in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively

to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states 'for delivery or use therein' the power of the state attaches. The obvious purpose of the Twenty-first Amendment was to preserve the intrastate jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.' (See LV Yale Law Journal, p. 815.) That amendment raised to constitutional dignity the right of each state to control its own liquor traffic, but there is not the slightest reason to believe that it was intended to modify the traditional federal-state relationship in connection with foreign imported liquor. See State of Georgia v. Wenger, D. C., 94 F. Supp. 976, affirmed 187 F. 2d 285, certiorari denied 342 U. S. 822, 72 S. Ct. 41, 96 L. Ed. 621.

"Moreover, the practical effect of appellant's interpretation cannot be overlooked. If the coastal states could tax or prohibit the importation of foreign liquors, it could 'dry up' the interior states so far as such liquors are concerned. Moreover, a coastal state could, for example, tax Irish whiskey and not tax Scotch whiskey, and thus influence foreign commerce and the tariff structure of the nation adverse to the public interest. It was for these very reasons that the United States Constitution placed all powers relating to foreign intercourse exclusively in the hands of the federal government. See for a few classic cases so holding Holmes v. Jennison, 14 Pet., 540, 570, 10 L. Ed. 579; Board of Trustees of University of Illinois v. U. S., 289 U. S. 48, 56, 53 S. Ct. 509, 77 L. Ed.

1025; United States v. Belmont, 301 U. S. 324, 331, 57 S. Ct. 758, 81 L. Ed. 1134. It should also be mentioned that if the coastal states could tax imported liquor and keep the tax proceeds they would be enriching themselves at the expense of the nation. The import-export clause above-quoted expressly provides that the revenue from any such imposts shall be for the use of the United States treasury. Thus, appellant's contention necessarily includes the argument that the Twenty-first Amendment repealed, *pro tanto*, this clause, as well, an argument which has no basis at all.

"One other general comment can be made. Although the Twenty-first Amendment has been in effect for nearly twenty-two years, the appellant is unable to point to any decision in the entire United States holding that a state or its agencies has the power under the amendment to levy an *ad valorem* tax on foreign imported liquor, while it is still in its original package, unconsigned and unsold, nor has appellant referred us to any statute of any city, county or state that has ever before attempted to levy such a tax. Of course, this does not prove that such a tax cannot be levied, but in view of the keen interest of local taxing authorities in finding new sources of tax revenue, if the two provisions of the Constitution are so inconsistent that the amendment repealed, *pro tanto*, the import-export clause as contended by appellant, it is somewhat surprising to find that no enterprising tax assessor has heretofore noted such inconsistency.

"Appellant predicates the major portion of its argument on the case of State Board of Equalization of California v. Young's Market Co., 299 U.S.

59, 57 S. Ct. 77, 81 L. Ed. 38. That case involved the constitutionality of a California statute imposing a license fee on importers of foreign beer. In that case the plaintiffs were domestic corporations engaged in the business of selling at wholesale in California beer imported from Missouri and Wisconsin. The tax was attacked on the ground that it violated the commerce and equal protection clauses of the federal Constitution. The court held that the license fee was valid under the Twenty-first Amendment, and stated, 299 U.S. at page 62, 57 S. Ct. at page 78:

> 'Prior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. * * *'
>
> 'The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors.'

"The court went on to explain that the Amendment confers the right on a state to prohibit all 'importations' if it so desires, and therefore, 299 U. S. at page 63, 57 S. Ct. at page 79, 'the state may adopt a lesser degree of regulation than total prohibition. * * * It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domes-

tic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?'

"This case has been followed in several cases all holding that intoxicating liquor imported from one state to another for delivery or use in the second state can be subjected under the Twenty-first Amendment to various discriminating practices not otherwise permitted by the commerce clause. See, for example, Mahoney v. Joseph Triner Corp., 304 U. S. 401, 58 S. Ct. 952, 82 L. Ed. 1424; Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243; Finch & Co. v. McKittrick, 305 U. S. 395, 59 S. Ct. 256, 83 L. Ed. 246.

"There is no doubt some very general language in the Young case, and the cases following it, which, separated from the facts to which such language was intended to apply, seems to support appellant's argument. But all of these cases dealt with interstate commerce and not with foreign commerce. As was pointed out in Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, quoted from above, there is a vast difference between the commerce clause and the import-export clause. The commerce clause contains but a limited prohibition while the import-export clause is absolute. Moreover, in the Young case, it is apparent that the beer brought into California from Missouri and Wisconsin was brought in for the purpose of 'delivery or use' in California, so that the case fell directly within the express language of the Twenty-first Amendment. In the instant case the liquors are still imports, not only

in their original packages, but unconsigned or unsold so far as ultimate destination is concerned.

"Certainly the Young case does not stand for the proposition that any state can prohibit the transportation across it of liquor intended for another state. It has been expressly held that the Twenty-first Amendment does not apply to intoxicating liquor merely passing through a state and not imported 'for delivery or use' in such state. Collins v. Yosemite Park & Curry Co., 304 U. S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502. In that case it was held that California had no power to tax liquor passing through the state to a National Park located within the state. See also Carter v. Commonwealth of Virginia, 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 605; Motor Cargo v. Division of Tax Appeals, etc., 10 N. J. 580, 92 A. 2d 774. This rule of inability to tax liquor merely passing through the state applies both to foreign imported liquor and to liquor in interstate commerce. In Von Hamm-Young Co. v. City and County of San Francisco, 29 Cal. 2d 798, 178 P. 2d 745, 171 A.L.R. 224, the Supreme Court of California, in a thorough and well-reasoned opinion, held invalid a personal property *ad valorem* tax imposed on liquor stored in San Francisco warehouses, which liquor had been partially purchased outside California, partially inside California but outside San Francisco, and some inside San Francisco. All the liquor was intended for transportation to Hawaii. It was held that the state had no power, under the Twenty-first Amendment, to tax such liquor while it was in interstate commerce.

"While it is true that the 'original package' doctrine has been limited in interstate commerce

cases by the doctrine that state power attaches when the goods have 'come to rest' in a state, Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 38, 78 L. Ed. 131, that limitation has never been applied to foreign imports. Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870; for several cases directly holding that the Twenty-first Amendment did not change this rule see During v. Valente, 267 App. Div. 383, 46 N. Y. S. 2d 385; Jameson & Co. v. Morgenthau, 307 U. S. 171, 59 S. Ct. 804, 83 L. Ed. 1189.

"We conclude that foreign imported liquor physically present within the taxing district but still in its original package, unconsigned and unsold on the assessment date, and still in the hands of the original importer, is still in foreign commerce, and that no state or any of the subdivisions has power to impose a personal property *ad valorem* tax on it."

See also National Distillers Products Corp. v. San Francisco (1956), 297 Pac. 2d 61; Cert. denied 352 U. S. 928, 1 L. Ed. 2d 163 (Dec. 3, 1956). This case involved ad valorem property tax assessments on both imported liquors and domestically produced liquors destined for export. The contention as to the taxability of the imports was abandoned on appeal as a result of the decision in the Parrot case (*supra*). The California Supreme Court also held that the liquors destined for export were also immune from state taxation under the Import-Export clause. San Francisco petitioned the U. S. Supreme Court for a writ of Certiorari which was denied. See further a recent

decision (January 9, 1962) by the Supreme Court of Wisconsin, which decided the question at issue in favor of the taxpayer (State Board of Review v. City of Milwaukee, *et al.*, 15 Wis. 2d 330, 112 N. W. 2d 914).

The correctness of the decisions in the Parrott and Wisconsin cases (*supra*) is further supported by the following statement of the law from American Jurisprudence:

> "While as a general rule the regulation of interstate and foreign commerce is a matter exclusively of federal regulation, the federal government has, by the Twenty-First Amendment, yielded some of its powers with reference to intoxicating liquors. The Twenty-First Amendment circumscribes the power of Congress by prohibiting the transportation or importation of intoxicating liquors into any state or territory for delivery or use in violation of the local law, but it does not deprive Congress of authority to control the importation of liquors into the United States. Moreover, Congress possesses the power to levy import duties on intoxicating liquors imported in foreign trade or commerce, and the several states, without the consent of Congress, are forbidden to lay duties on imports other than such as may be necessary for executing their inspection laws." 30 Am. Jur. 554-555.

ARGUMENT (Continued)

PART IV.

Is the Tax Imposed by K.R.S. 243.680(2) an Inspection Fee as Distinguished From a Revenue Measure?

The Import-Export Clause forbids a state from levying any tax on imports "except what may be absolutely necessary for executing its inspection laws".

To qualify as a levy necessary for the execution of inspection laws, it is encumbent that the state law imposing the fee provide for an actual inspection of the imported article. K.R.S. 243.680(2) makes no such provision nor does Regulation PN-13 (R., p. 20).

> "To come within the exception to the Federal Constitutional provision which forbids states to levy any imposts or duties on imports or exports, except such as are necessary for the execution of inspection laws, an inspection law must provide for actual inspection." 29 Am. Jur. 369, 370.

It is also imperative that the so-called inspection fee bear some close connection to the costs of the inspection service. Otherwise the levy will be regarded as a revenue measure and not an inspection fee. 29 Am. Jur. 368.

Classification of a state levy or impost as an "inspection fee" under Article I, Sec. 10, cl. 2, is narrowly circumscribed.

> "Generally, such laws are confined to such particulars as, in the estimation of the legislature and in accordance with the customs of trade, are

necessary to fit an article for market, by giving the purchaser public assurance that the article is in the condition and of the quality which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things with respect to which inspection is required are dangerous or obnoxious in themselves. It has never been regarded as within the legitimate scope of inspection to forbid trade with respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse." 29 Am. Jur. 368, 369.

The revenues raised by the Kentucky tax on foreign imports of distilled spirits meet none of the foregoing criteria of an "inspection fee".

The inspection of imported distilled spirits as to their identity, proof, quality, standards of fill, and labeling is all performed by the Alcohol and Tobacco Tax Division, Internal Revenue Service, under authority of the Federal Alcohol Administration Act (27 U. S. C. 201-211).

Imported whiskey conforming to the labeling laws of the United States is deemed properly labeled under Kentucky Law (K.R.S. 244.230).

Since Kentucky makes no independent inspection of imported distilled spirits, any contention that the Kentucky import tax is an inspection law is, therefore, without merit. K.R.S. 243.680(2) is purely a revenue measure and has always been so regarded.

ARGUMENT (Continued)

PART V.

Petitioner's Brief.

Counsel for Petitioner rely heavily on the cases of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605 (1944), and Gordon v. Texas, 310 S. W. 2d 328, aff'd 355 U. S. 369, 2 L. Ed. 2d 352 (1958).

These cases were also their main reliance before the Kentucky Court of Appeals. In rejecting the applicability of the Carter case, Chief Justice Stewart had this to say:

> "The case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605, relied on by appellee to sustain its right to levy the tax under consideration simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved" (R., p. 39).

In Epstein v. Idlewild Bon Voyage Liquor Corp., 212 Fed. Supp. 376 (1962), a three judge court for the Southern District of New York dealt at length with the decisions in the Carter and Gordon cases, *supra*, and also found that they were inapplicable to the facts in the Idlewild case which involved the taxation of exports of intoxicating liquor, whereas the case at bar involves imports. In view of the fact that the Idlewild case (October Term 1963, No. 116) is scheduled to be argued immediately preceding the arguments in the

case at bar, the Carter and Gordon cases will doubtless be discussed in the Idlewild case hearing; and so it seems needless to lengthen this brief by any further discussion of them here.

SUMMARY AND CONCLUSION.

1. K.R.S. 243.680(2) imposes a tax on all distilled spirits imported into Kentucky without regard to whether such spirits are imported from other states of the Union or from foreign countries.

2. Imports from foreign countries are immune from taxation by a state under the Import-Export Clause of the U. S. Constitution so long as they remain in the hands of the original importer, in unbroken packages, prior to sale and before being put to the use for which they were imported.

3. In 1871 this Court decided that imports of alcoholic liquors of foreign origin must be treated on the same basis as other imported articles under the Import-Export Clause.

4. Although the passage of the Twenty-First Amendment (1933) to the U. S. Constitution has had the effect of giving to the states a greater degree of control over intoxicating liquors moving in interstate commerce, the provisions of this Amendment have not repealed pro tanto the Import-Export Clause as applied to the taxation by a state of liquors imported from foreign countries.

5. K.R.S. 243.680(2) is a revenue measure and not an "inspection law" within the meaning of the Import-Export Clause, which forbids a state to lay ANY tax

on imports from foreign counties "except what may be absolutely necessary for executing its inspection laws".

6. The highest courts of three states (California, Wisconsin and Kentucky) have all rendered unanimous opinions invalidating state or local levies of taxes on imported liquors. The Wisconsin Court based its decision on the California Supreme Court case (*supra*) and the Kentucky Court of Appeals followed the California and Wisconsin cases, and adopted, as noted *supra*, the reasoning of the California opinion.

7. K.R.S. 243.680(2) is unconstitutional as applied to distilled spirits imported from a foreign country, in the hands of the original importer, in unbroken packages, prior to sale and before being put to the use for which they were imported.

8. For the reasons above stated, Respondent urges that the decision of the Kentucky Court of Appeals be affirmed.

Respectfully submitted,

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January 10, 1964.

This is to certify that I have in accordance with the provisions of Rule 33, served opposing counsel with copies of this brief by addressing same to counsel at their respective post office addresses and depositing same in a United States mailbox with first class postage prepaid, all on this 10th day of January, 1964.

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